IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 330 OF 2005

Ananda Dattu Amte
(since deceased by heirs)
1A. Smt.Shailabai Ananda Amte & ors. ... Appellants.
Versus.
Ashok Shamrao Amte & ors. ... Respondents.

Shri N.D.Hombalkar for the Appellants.

Shri S.S.Patwardhan with Shri P.G.Chavan for the Respondents Nos.1 and 2.

Shri A.A.Garge i/by Shri N.K.Bubna for the Respondents Nos.3 to 16.

CORAM : ABHAY S. OKA, J.

DATED : 30th March, 2005.

P.C.:

1. Heard Shri Hombalkar for the Appellants. The Appellants are the legal representatives of the deceased Defendant No.8. The Respondent No.1 is the original Plaintiff. The Respondent No.1 filed a suit for partition. In the said suit the contention of the Respondent No.1 is that certain suit properties are the self acquired properties of his father deceased Shamrao and the remaining suit properties are ancestral properties of the family headed by the deceased Bayaji. The trial Court decreed the suit filed by the Respondent No.1 by holding that the suit properties mentioned in paragraph 1A to 1E, 1G and 1H are the properties held by the deceased Shamrao and rest of the properties were held to be the properties of the larger joint family.

2. In the appeal preferred to the District Court by the present Appellants (legal representives of the original Defendant No.8) decree is modified by the Appellate Court by holding that the property described in paragraph 1C was the self acquired property of the original Defendant No.1-Pandurang, another son of Shamrao and therefore, cannot be subjected to partition. The Appellate Court held that the Appellants herein have failed to establish that there was sufficient nucleus available of the ancestral property from which the deceased Shamrao could have purchased the properties described in paragraphs 1A to 1E and 1G and 1H. The Appellants are the legal representatives of the deceased Defendant No.8. The Defendant No.8 is not claiming through Shamrao. The Defendant No.8 is the son of uncle of the deceased Shamrao. The Defendant No.8 and deceased Shamrao are the grand sons of Bayaji. The Appellants are held entitled to 1/4th share in the properties of the larger Joint Family.

3. Shri Hombalkar submitted that a specific plea was raised in the Written Statement by the Appellants that certain joint family properties were not included in the suit and therefore, the suit for partition was not maintainable. He submitted that the approach of the Appellate Court was perverse inasmuch as that though the original Defendant No.1 did not prefer any appeal, the

Appellate Court has modified the decree in favour of the original Defendant No.1. Lastly he submitted that the existence of sufficient nucleus was established by the Appellants from which Shamrao could have purchased the properties held by him.

4. In so far as the first contention is concerned, a perusal of the Judgment of the Appellate Court shows that the said contention was not raised before the first Appellate Court. The first Appellate Court is the final Court of facts and therefore, the said contention ought to have been raised before the first Appellate Court. It is not the case of the Appellants that the said contention was raised and was not decided. Hence it is not open for the Appellants now to raise the said contention in the Second Appeal.

5. The finding of the trial Court is that the properties described in paragraph 1A to 1E, 1G and 1H were the properties held by Shamrao. The Appellate Court held that the Appellants could not substantiate their contention that there was sufficient nucleus available of the ancestral property from which the deceased Shamrao could have purchased the said properties. Though no appeal was preferred by the original Defendant No.1, the Appellate Court came to the conclusion that the original Defendant No.1 who is also a son of Shamrao had acquired the property described in

paragraph 1C of the plaint and therefore, by exercising powers under Order XLI Rule 33 of the Code of Civil Procedure, 1908, the Appellate Court made modification in the decree passed by the trial Court by deleting the property mentioned in paragraph 1C of the plaint.

6. The issue canvassed before the Appellate Court was that the properties mentioned in paragraphs 1A to 1E, 1G and 1H were not self acquired properties of Shamrao. Unless the said contention is substantiated by the Appellants, they cannot have any right, title and interest in the property described in paragraph 1C. The findings of fact have been recorded by the Courts below that the existence of sufficient nucleus was not established by the Appellants and therefore, the properties described in paragraph 1A to 1E, 1G and 1H will have to be treated as self acquired properties of Shamrao. After considering the oral and documentary evidence on record the said findings have been arrived at the Courts below. I find no perversity in the said findings.

7. Therefore, the Appellants cannot have any right, title and interest in respect of the properties described in paragraph 1A to 1E, 1G and 1F. They have failed to prove that nucleus of ancestral family was in existence from which Shamrao could have acquired the said properties. In the circumstances, if it was held

by the Appellate Court that one of the said properties i.e. 1C was self acquired property of one of the sons of Shamrao, the Appellants cannot have any grievance. At the highest a grievance could have been made by the original Plaintiff or other legal representatives of the deceased Shamrao.

8. Placing reliance on the Judgments of the Apex Court reported in AIR 1998 Supreme Court, page 3118 (K.Muthuswami Gounder v/s. N.Palaniappa Gounder) and AIR 1999 S.C. page 3571 (Ravinder Kumar Sharma v/s. State of Assam), Shri Hombalkar submitted that power under Rule 33 of Order XLI of the said Code could have been exercised by the Appellate Court only in exceptional circumstances. However, it must be noted here that even if the decree passed by the Appellate Court as regards the property mentioned in paragraph 1C is set aside, the finding of the trial Court that it was the self acquired property of Shamrao will have to be restored and therefore even in that event the Appellants will not get any right, title or interest in the property described in paragraph 1C and therefore, the submission of Shri Hombalkar based on the Judgments of the Apex Court is not considered by me as the grievance regarding findings recorded by the Appellate Court as regards the property described in paragraph 1C cannot be made by the Appellants.

9. In view of the foregoing discussion no substantial question of law arises and the Second Appeal is dismissed with no order as to costs.

Judge.